

Supreme Court, U. S.

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In The
Supreme Court of the United States

—0—
October Term, 1976

No. 76-1294

—0—
DUTTA SESHACHALAM,

Petitioner,

vs.

CREIGHTON UNIVERSITY SCHOOL OF MEDICINE,

Respondent.

—0—
**RESPONSE TO
PETITION FOR WRIT OF CERTIORARI**

—0—
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STATUTORY AND RULE PROVISIONS

Rule 4(a) of the Federal Rules of Appellate Procedure provides as follows:

“(a) *Appeals in Civil Cases.* In a civil case (including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising therein) in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule

3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days of such entry. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this subdivision, whichever period last expires.

"The running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed in the district court by any party pursuant to the Federal Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: (1) granting or denying a motion for judgment under Rule 50 (b); (2) granting or denying a motion under Rule 52 (b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4) denying a motion for a new trial under Rule 59. A judgment or order is entered within the meaning of this subdivision when it is entered in the civil docket.

"Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate."

Rule 20 of the Rules of Practice of the United States District Court for the District of Nebraska provides in part as follows:

"A. Oral Argument: Oral argument shall be had only upon order of the court. . . .

* * *

"C. Briefs: Upon filing a motion, the party shall at the same time serve upon all other parties a written memorandum brief. . . . In like manner, each adverse party may, within five days after service of the motion, serve and deliver a written memorandum brief in opposition to the motion.

"D. Failure to Serve Brief: If the moving party fails to serve a memorandum brief, the court may deem the motion abandoned and enter an order denying it, and in that event, Rule 12 (a) (1) of the Federal Rules of Civil Procedure shall apply. Failure of an adverse party to serve a memorandum brief shall not be considered as a confession of the motion.

* * *

"F. Submission on Briefs: If no oral argument is ordered, a motion, except a motion for summary judgment, shall be considered submitted five days after filing and thereafter shall be decided by the court upon the briefs submitted.

"G. Extension of Time: For good cause shown, the court may extend the time for the doing of any act required by this rule."

Rule 59 of the Federal Rules of Civil Procedure provides in part as follows:

"(b) *Time for Motion.* A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

* * *

"(e) *Motion to Alter or Amend a Judgment.* A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

STATEMENT OF THE CASE

On August 6, 1976, the District Court for the District of Nebraska entered an order dismissing Count I of the petitioner's complaint and entering judgment for the respondent upon Count II of the petitioner's complaint. On August 13, 1976, the petitioner filed a motion for reconsideration. On August 24, 1976, the District Court overruled the petitioner's motion for reconsideration. On August 31, 1976, the petitioner filed a motion for new trial. On August 31, 1976, the respondent filed an objection to the petitioner's motion for new trial on the grounds that the motion was untimely. Although placed on notice that the respondent had objected to the motion for new trial on the basis that it was untimely, the petitioner did not file a notice of appeal from the denial of the motion for reconsideration until after the District Court overruled the motion for new trial. The District Court on September 29, 1976, overruled the motion for new trial on the basis that it was filed more than ten days after the entry of judgment. The petitioner then filed a notice of appeal on October 1, 1976, and the respondent filed a motion to dismiss the appeal on October 27, 1976.

In considering the respondent's motion to dismiss the appeal, the Eighth Circuit Court of Appeals held on December 13, 1976, that the petitioner's thirty day period in which to appeal as required by Rule 4(a) of the Fed-

eral Rules of Appellate Procedure had expired. However, the Eighth Circuit "deferred" action on the respondent's motion to dismiss and remanded the case to the District Court to permit the petitioner to request the District Court to accept *nunc pro tunc* the notice of appeal filed on October 1, 1976, on the ground of excusable neglect. The petitioner then filed a motion with the District Court to extend the petitioner's time for appeal on the ground of excusable neglect. On December 17, 1976, the petitioner filed a showing in which he set forth the grounds which he claimed constituted excusable neglect. On January 24, 1977, the District Court denied the petitioner's motion to extend the petitioner's time to appeal and specifically found that excusable neglect was not present. Petitioner on January 25, 1977, filed a notice of appeal from the District Court's order denying the petitioner an extension of time for appeal. The petitioner then filed a motion for relief in the nature of a writ of mandamus, asking the Court of Appeals to direct the District Court to accept the petitioner's notice of appeal *nunc pro tunc* on the ground of excusable neglect. Attached to this motion as an exhibit was the petitioner's showing which had been filed in the District Court and which set forth the grounds upon which the petitioner relied in claiming that excusable neglect existed.

On February 10, 1977, the Eighth Circuit entered an order dismissing the appeal in its entirety. On February 17, 1977, the Eighth Circuit denied the petitioner's motion for an order in the nature of a writ of mandamus to the District Court. The petitioner then filed motions for rehearing and for rehearing *en banc*, and the Eighth Circuit denied these motions. On March 4, 1977, the petitioner filed a motion to stay mandate.

SUMMARY

The decision by the Eighth Circuit in this case is not in conflict with the Second Circuit Court's decision in *Matter of Orbitec Corporation*, 520 F. 2d 358 (2 Cir. 1975). In the latter case, the Second Circuit held that the District Court's denial of an extension of time to appeal was an appealable order. However, in that case, the decision by the District Court was a final order and in the present case the decision of the District Court to deny the petitioner's motion for an extension of time to appeal was not a final order for the reason that the Eighth Circuit still had before it the petitioner's appeal. In any event, when the Eighth Circuit dismissed the appeal, it had before it all the necessary information to ensure that the District Court had not committed a clear abuse of discretion.

The circumstances of the present case do not constitute excusable neglect. The petitioner failed to comply with the clear provisions of Rule 4(a) of the Federal Rules of Appellate Procedure. A failure to properly interpret a statute does not constitute excusable neglect.

ARGUMENT

There is no conflict between the decision of the Eighth Circuit in this case and any decisions of the Second Circuit.

In his petition for writ of certiorari, the petitioner argues that the failure of the Eighth Circuit Court of

Appeals to conduct a full hearing on the petitioner's appeal from the order of the District Court denying an extension of time for appeal on the ground of excusable neglect is in conflict with the decision of the Second Circuit in *Matter of Orbitec Corporation*, 520 F. 2d 358 (2nd Cir. 1975). However, the decision by the Eighth Circuit does not in fact conflict with the *Orbitec* decision. The appellant in *Orbitec* sought review of the judgment of the District Court for the Southern District of New York affirming two orders of the Bankruptcy Judge. The appellant, failing to file a notice of appeal within the required 30 days, filed a motion for extension of time to appeal; however, the motion was denied by the District Court. The appellant subsequently filed a notice of appeal from the order of the District Court denying the motion for extension of time. The Second Circuit Court of Appeals treated the order refusing to grant an extension of time as an appealable order.

This respondent does not question the decision of the Second Circuit in *Matter of Orbitec Corporation, supra*. In that case, the order of the District Court denying an extension of time to appeal was a final order.

In the case at bar, the situation is far different. When the petitioner failed to file the notice of appeal within the required 30 day period, he also neglected to file a motion with the District Court asking for an extension of time in which to file a notice of appeal on the ground of excusable neglect. Instead, the petitioner filed the notice of appeal on October 1, 1976, even though it was filed out of time. The respondent filed a motion to dismiss the appeal on the basis that it was not timely filed. The Eighth Circuit held that the appeal was filed out of time, but withheld ruling

on the respondent's motion to dismiss and decided to give the petitioner an opportunity to ask the District Court for an extension of time on the ground of excusable neglect. Thus, the Eighth Circuit did not rule on the petitioner's appeal nor the respondent's motion to dismiss the appeal, but simply remanded a specific issue for determination by the District Court. Upon the determination by the District Court that there was no excusable neglect, the respondent's motion to dismiss the appeal on the basis that it was untimely was once again before the Eighth Circuit. Therefore, the order of the District Court denying the request for an extension of time was not a final order.

The petitioner's argument in this case is contrary to an often expressed policy against piecemeal appeals. As this Court stated in *Cobblewick v. United States*, 309 U. S. 323, 325, 60 S. Ct. 540, 84 L. Ed. 783, 785 (1940) :

"Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause."

The Eighth Circuit had no obligation to remand part of the case back to the District Court for a determination of whether excusable neglect existed. The petitioner should have raised that issue by motion to the District Court prior to his appeal to the Eighth Circuit. The only provision

for granting an extension of time to appeal is found in Rule 4 (a) F. R. A. P. which provides that:

"... Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party...."

Thus, the Court of Appeals cannot enter such an order extending the time to appeal. In the interest of fairness, the Eighth Circuit permitted the issue of excusable neglect to be raised in the District Court instead of merely dismissing the appeal as it could have.

After taking advantage of the Eighth Circuit Court's discretionary decision to give the petitioner another chance, that is, allow him to raise the issue of excusable neglect with the District Court after he failed to raise the issue on his own motion, the petitioner now claims that the Eighth Circuit had a duty to conduct a full scale hearing into the District Court's determination. Of course, the Eighth Circuit had the complete record, including the petitioner's showing of excusable neglect, available to it for its ruling. In light of the Eighth Circuit's discretionary decision to give the petitioner one more chance, it is unnecessary and unfair to require the Eighth Circuit to conduct a full scale review of that decision.

At the heart of the petitioner's claim is the concept that he was not given his "day in Court." The respondent respectfully submits that the petitioner has had more than his "day in Court". The Eighth Circuit Court of Appeals has entered 5 orders or opinions in connection with the petitioner's appeal in this matter. The Eighth Circuit gave full consideration to the question of whether the petitioner had filed a timely notice of appeal, and it

rendered an opinion. The Eighth Circuit found that the petitioner failed to file a timely notice of appeal. While deferring a decision on the respondent's motion to dismiss the petitioner's appeal, the Eighth Circuit remanded the case for a determination of whether excusable neglect existed. Upon remand, the petitioner filed a six-page showing in which he set forth the reasons upon which he relied in arguing that excusable neglect existed. In a well reasoned opinion which discussed the issue at length, the District Court held that the circumstances surrounding the petitioner's failure to file a timely notice of appeal did not constitute excusable neglect.

The petitioner then attempted to appeal from that order even though his previous appeal from the denial of his motion for reconsideration was still pending with the Eighth Circuit. Upon viewing the record, which included the District Court's carefully written opinion and the showing filed by the petitioner in connection with his claim of excusable neglect, it was clear that the District Court had not abused its discretion. The appropriate standard for review on appeal of a ruling as to the absence of excusable neglect is that the reviewing court will reverse only if there has been a clear abuse of discretion. *Buckley v. U. S.*, 382 F. 2d 611 (10 Cir. 1967); *Ohliger v. United States*, 308 F. 2d 667 (2 Cir. 1962).

In light of the record, including the showing of the petitioner and the opinion of the District Court, there was no need for the Eighth Circuit to conduct any further hearing into the matter.

The petitioner's mistaken interpretation of the clear language of the Federal Rules of Ap-

pellate Procedure does not constitute excusable neglect.

In connection with the petitioner's argument that excusable neglect existed, certain post judgment proceedings and their dates are particularly relevant and in order to make the chronology of these proceedings more clear, the respondent sets out the relevant dates below:

August 6, 1976—Judgment was entered by District Judge Warren K. Urbom.

August 13, 1976—Petitioner filed a motion for reconsideration.

August 24, 1976—An order was entered by Judge Urbom denying petitioner's motion for reconsideration.

August 31, 1976—The petitioner filed a motion for new trial.

August 31, 1976—The respondent filed an objection to petitioner's motion for new trial on the ground that it was filed out of time.

September 29, 1976—Judge Urbom entered an order denying the petitioner's motion for new trial on the ground it was filed out of time.

October 1, 1976—The petitioner filed a notice of appeal.

There are several obvious conclusions to be made from the above chronology. First, the petitioner's motion for new trial was filed twenty-five days after judgment was entered and was, therefore, filed fifteen days late. Second, the petitioner's notice of appeal was filed thirty-seven days after the order denying petitioner's motion for reconsideration was entered and was, therefore, filed seven days late.

The petitioner's basic claim is that the Eighth Circuit changed a rule of procedure and that it was excusable

neglect on the part of the petitioner to fail to foresee this change. However, there was no change in procedure announced in this case. The Eighth Circuit merely applied Rule 4 (a) of the Federal Rules of Appellate Procedure as it has always been applied. Rule 4 (a) requires an appellant to file its notice of appeal within 30 days from the order or judgment appealed from.

"In a civil case (including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising therein) in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from; . . ." Rule 4 (a) F. R. A. P.

The petitioner failed to file his notice of appeal within 30 days from the order entered on August 24, 1976, and, therefore, his subsequent appeal on October 1, 1976, was untimely. It has long been the rule that the Court of Appeals does not obtain jurisdiction over an appeal when the notice of appeal has not been timely filed. *Alexander v. Sacha*, 439 F. 2d 742 (9 Cir. 1971); *Files v. City of Rockford*, 440 F. 2d 811 (7 Cir. 1971); *Albers v. Gant*, 435 F. 2d 146 (5 Cir. 1970); *Md. Cas. Co. v. Conner*, 382 F. 2d 13 (10 Cir. 1967); *Southern Agency Co. v. LaSalle Cas. Co.*, 393 F. 2d 907 (8 Cir. 1968).

The 30-day period for filing the notice of appeal was not terminated by the Petitioner's filing of a motion for new trial on August 31, 1976, because only a "timely" motion will terminate the running of the 30-day period for appeal. Rule 4 (a) F. R. A. P. provides that "The running

of the time for filing notice of appeal is terminated as to all parties by a timely motion filed in the District Court. . . ." Not only is Rule 4 (a) clear on this point, but the case law is unanimous in strictly applying the requirement that the motion be timely in order to stop the running of the 30-day period. See *Martin v. Wainwright*, 469 F. 2d 1072 (5 Cir. 1972); *Gulf-Tampa Drydock Co. v. The Vessel Virginia Trader*, 435 F. 2d 150 (5 Cir. 1970); *Silk v. Sandoval*, 435 F. 2d 1266 (1st Cir. 1971). The motion for new trial was filed twenty-five days after the original judgment of August 6, 1976, was entered. Therefore, the motion was untimely and did not terminate the running of the 30-day period.

The fact that the motion for new trial was filed within 10 days from the entry of the order denying the motion for reconsideration is irrelevant. Rule 59 (b) of the Federal Rules of Civil Procedure provides that a motion for new trial must be "served not later than 10 days after the entry of the judgment." (Emphasis added.) Rule 59 lists no exceptions to this requirement and Rule 6 (b) of the Federal Rules of Civil Procedure gives the trial court discretion in enlarging the time for filing some motions, but it also says:

" . . . but it may not extend the time for taking any action under Rules . . . 59 (b) . . . "

Thus, the motion for reconsideration did not affect the running of the 10-day period for the filing of the motion for new trial. Since the motion for new trial was not timely filed, it does not terminate the running of the 30-day period for appeal.

The decision of the Eighth Circuit in this case does not conflict with *Theodoropoulos v. Thompson-Starrett Co.*, 418 F. 2d 350 (2 Cir. 1969), or *Hicklin v. Edwards*, 222 F. 2d 921 (8 Cir. 1955). *Hicklin* involved an appeal from a default judgment and *Theodoropoulos* concerned an appeal from a *sua sponte* dismissal for lack of prosecution. The appellants in both of these cases did not have an opportunity to be heard by the trial court before a judgment was entered. In *Hicklin*, the appellant's motion to set aside a default judgment was his first opportunity to be heard and his motion for rehearing was his only opportunity to bring new arguments to the Court's attention before taking an appeal. Likewise, in *Theodoropoulos*, the plaintiff's motion to reinstate was his first opportunity to be heard by the trial court, and his motion for rehearing was his sole opportunity to call new arguments to the Court's attention before bringing an appeal. These two cases merely reflect the concept that a losing party should have one opportunity to bring new arguments to the Court's attention without having the time for appeal run. This distinction is thoughtfully explained by Professor Moore in his Treatise on Federal Practice. Recognizing the distinction noted by Professor Moore, the Court in *Theodoropoulos* agreed with the distinction advocated by Professor Moore and by the respondent in the present case. The Court stated as follows:

"6. Professor Moore states applicable case law to hold:

'A motion to reconsider an order disposing of a motion of the kind enumerated in Rule 4 (a) does not again terminate the running of the time for appeal. An initial motion to reconsider the judg-

ment is a motion under Civil Rule 59 (e) and *does* terminate the running of the time for appeal. But a motion to reconsider the reconsideration does not terminate the running of the time for appeal.' 9 Moore, Federal Practice ¶ 204.12[1], pp. 951-952 (2d ed. 1969).

"We are in general agreement with the philosophy advanced for this position:

"The clear purpose of these rules is to give all parties an opportunity to challenge the judgment at the district court level without enabling them indefinitely to extend litigation by tactical maneuvering in the district court. But if a party who has once sought reconsideration by the district court is permitted to seek reconsideration of its reconsidered view, and if each motion for reconsideration terminates the running of the time for appeal, litigation at the district court level can be stretched out endlessly.' 9 Moore, *supra*, at 952 n. 7.

"However, we do not believe it should be applied to a *sua sponte* dismissal for failure to prosecute such as this. In such a case, the explanation for the failure is presented to the district court and passed on for the first time in the form of some type of motion under Rule 59 (e); and a subsequent motion for reargument, such as the one in the case before us, represents a party's only opportunity to call new facts or arguments to the court's attention before taking an appeal. See *Hines v. Seaboard Airline R. R. Co.*, 341 F. 2d 229, 232 (2 Cir. 1965); see also *Vine v. Beneficial Finance Co.*, 374 F. 2d 627 (2 Cir.), cert. denied 389 U. S. 970, 88 S. Ct. 463 (1967); *Terrasi v. South Atlantic Lines, Inc.*, 226 F. 2d 823, 824 (2 Cir. 1955), cert. denied 350 U. S. 988, 76 S. Ct. 475, 100 L. Ed. 855 (1956)." (p. 353, n. 6).

The petitioner had his chance to bring new arguments to the District Court's attention. He filed a motion for re-

consideration and it was denied. The petitioner had the right to appeal from the denial of his motion for reconsideration; however, the petitioner failed to file a notice of appeal within the requisite 30-day period and, therefore, his appeal filed on October 1, 1976, was untimely. Apparently, it is the petitioner's position that he could continue to file any number of post judgment motions in an attempt to bring new arguments to the trial court's attention and would never have the 30-day time for appeal run. Such a position is obviously untenable.

The case of *Dockery v. Travelers Co. of Hartford, Conn.*, 349 F. 2d 1017 (5 Cir. 1965), is directly on point. In *Dockery*, the Court held that a timely motion to set aside an order of dismissal terminated the running of the time for appeal, but that a subsequent motion to reconsider the order denying the motion did not again terminate the running of the time for appeal. See also *Yates v. Behrend*, 280 F. 2d 64 (D. C. Cir. 1960). Thus, the tactic taken by the petitioner was directly opposed to the case law on point.

In his petition for a writ of certiorari, the petitioner states that this Court has adopted policies of favoring reconsideration of a judgment at the lowest possible level and favoring the interpretation of a post-trial motion, however captioned, as a motion which stops the running of the time for appeal. The respondent does not dispute that statement of policy, but respectfully submits that this policy has in no way been violated by the proceedings in this case. The petitioner sought review of the judgment at the District Court level by filing a motion for reconsideration. This motion was denied by the District

Court. There is no policy which favors repeated reconsiderations at the District Court level. Judicial economy demands that litigation not be extended indefinitely, and it is the petitioner's position that he can file any number of post-judgment motions questioning the correctness of the judgment without having his time for appeal expire. There is simply no valid public policy which supports the petitioner's position.

The petitioner implies that since his motion for reconsideration was denied prior to his filing a brief, the District Court did not rule on the merits of the motion and, therefore, he was entitled to file another motion questioning the correctness of the judgment which would terminate the running of time for appeal. The petitioner failed to file any brief, and under Rule 20(f) of the Rules of Practice of the United States District Court for the District of Nebraska, the motion for reconsideration was considered submitted five days after filing, which was August 13, 1976. Although the District Court waited until August 24, 1976 to render its decision, the petitioner had still not filed a brief in support of his position. It seems quite illogical that the failure of the petitioner to observe the local Federal District Court Rules should enable him to have a right he would not otherwise have, that is, file another motion which would halt the running of the thirty day period. In any event, in its January 24, 1977 order the District Court stated that it considered the motion for reconsideration on the merits.

The petitioner complains about being placed in a box, that is, he could either file another motion questioning the validity of the judgment or he could appeal from the order

of August 24, 1976. He alleges that the latter choice would deprive the District Court of an opportunity for full review. The petitioner's characterization of his choice of appealing the order of August 24, 1976, is clearly incorrect. The District Court already had an opportunity for full review of its original order when it denied the petitioner's motion for reconsideration. In any event, the imaginary box which petitioner claims to have been in was the result of the petitioner's failure to file a brief in accordance with Rule 20 of the Rules of Practice of the United States District Court for the District of Nebraska.

Since the petitioner failed to observe the local Federal District Court Rules, failed to correctly interpret the clear language of the Federal Rules of Appellate Procedure and failed to note the case law directly on point, the circumstances of the present appeal do not constitute excusable neglect. "Excusable neglect calls for 'circumstances that are unique or extraordinary.'" *Spound v. Mohasco Ind., Inc.*, 534 F. 2d 404, 411 (1 Cir. 1976). The circumstances of the present appeal are neither unique nor extraordinary, and it is clear that the District Court did not commit a clear abuse of discretion in finding that the circumstances do not constitute excusable neglect.

CONCLUSION

The Court should deny the petition for writ of certiorari for the reason that there is no conflict between the

circuits as to the appealability of a denial of an extension of time to appeal on the ground of excusable neglect.

In addition, the failure of the petitioner to correctly interpret the clear language of the Federal Rules of Appellate Procedure does not constitute excusable neglect.

Respectfully submitted,
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